BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JOHN FAROH	)	
Claimant	)	
VS.	)	
	)	Docket No. 201,856
SEDGWICK COUNTY	)	
Respondent	)	
Self-Insured	)	

ORDER

Respondent appealed the December 6, 1996, Award entered by Administrative Law Judge John D. Clark.

APPEARANCES

Claimant appeared by his attorney, Joni J. Franklin of Wichita, Kansas. Respondent appeared by its attorney, E. L. Lee Kinch of Wichita, Kansas.

RECORD AND STIPULATIONS

The record considered by the Appeals Board and the parties' stipulations are listed in the Award.

ISSUES

Respondent appealed listing only the issue of nature and extent of claimant's disability in its application for review. However, in its letter brief to the Appeals Board respondent described "the issues which remain in dispute are as follows:

"Alleged Accidental Injury of October 11, 1994:

1. Issue of compensability

2. Issue of notice

3. Issue of written claim

4. Nature and extent of disability

Alleged Accidental Injury of March 22, 1995:

1. Nature and extent of disability"

Claimant has not raised any issues but, instead, argues that the Award by the Administrative Law Judge should be affirmed in its entirety.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire file and considered the briefs and arguments of the parties the Appeals Board finds that the Award entered by the Administrative Law Judge should be modified.

Claimant was hired by respondent in May of 1986 as a temporary employee. He was subsequently made a full-time employee in 1988. At all times relevant to this proceeding, claimant was classified as an Operator II. His duties included operating a variety of machines and vehicles used in the repair and maintenance of county roads.

Claimant initially filed a form E-1 Application for Hearing alleging a single date of accident of March 22, 1995. The claim was later amended to allege a series of accidents beginning October 11, 1994, and continuing each and every day worked thereafter. Claimant's last day worked was October 25, 1995. Based upon the stipulation contained in claimant's submission letter to the Administrative Law Judge, a single date of accident of March 22, 1995, was found by the Administrative Law Judge and his award was based on that finding.

Despite this claim being brought as a single accident date of March 22, 1995, and the Administrative Law Judge's adoption of this date for purposes of award, the evidence indicates a prior accidental injury occurred on or about October 11, 1994. Claim for that injury appeared to have been abandoned at regular hearing, but claimant nevertheless raised it in both his submission letter to the Administrative Law Judge and in his Appellee's Brief to the Appeals Board.

The October 11, 1994, accident is described in claimant's submission letter to the Administrative Law Judge as follows:

> "On October 11, 1994 Mr. Faroh was competing [sic] a work assignment of putting up street signs on various county roads. While doing this Mr. Faroh was operating a jackhammer, and immediately began having lower back pains. Mr. Faroh immediately consulted his own private physician. Initially, Mr. Faroh's doctor, Dr. George, felt that he may have a kidney problem, but as soon as Mr. Faroh learned that it was a back injury from the jack hammer he notified his supervisor, Mr. Phillip Chambers. Mr. Faroh stated that this notice was made within one and [a] half weeks of the accident. No treatment was authorized, and no action was taken by any county agent after this notice in October of 1994. In fact, Mr. Chambers was notified of Mr. Faroh's work restrictions issued by his private physician, but on numerous occasions Mr. Chambers attempted to violate them by insisting that Mr. Faroh do work outside his medically diagnosed physical abilities at that time. (Citations to record omitted.)"

In Appellee's Brief to the Appeals Board, claimant conceded that because the Administrative Law Judge's Award was based upon only the March 22, 1995, accident date, all arguments made by claimant concerning the October 11, 1994, accident date are moot. However, claimant argues "in the alternative" that "all necessary notice was given to respondent as to the October 11, 1994, accident" citing Pyeatt v. Roadway Express, Inc., 243 Kan. 200, 756 P.2d 438 (1988).

Claimant testified that he verbally advised his supervisor, Mr. Phillip Chambers, of his October 11, 1994, back injury about a week and a half after its occurrence. Claimant seems to be arguing that this vague reference to a conversation which took place "about a week and [a] half" after the accident proves that claimant gave notice within the ten days required by K.S.A. 44-520. On the other hand, claimant's reliance upon Pyeatt in support of his argument that timely notice was given appears to be based upon the fact that respondent has not established that it was prejudiced by claimant's failure to give notice within ten days. Of course, the notice statute has been amended since the Pyeatt decision, substantially altering a claimant's burden with respect to the notice requirement. Mr. Chambers testified in this matter and denied receiving notice of an October 11, 1994, accident. Furthermore, his testimony called into question the claimant's version of how his accident occurred.

Claimant testified that he injured his low back on October 11, 1994, while installing road signs with a jackhammer. Claimant's supervisor, Mr. Chambers, testified that he maintained daily time records which include work assignments of his employees. His review of the daily time sheets for the month of October 1994 revealed that claimant only worked with road signs a portion of one day during the month of October, that being on October 5, 1994. On the date of claimant's alleged injury, October 11, 1994, his job

assignment consisted of hauling dirt for the entire eight-hour work day. Mr. Chambers also testified that he did not recall claimant reporting a back injury in October of 1994. Furthermore, had claimant reported such an injury, an accident report would have been prepared and claimant would have been referred to the respondent's physicians. The Appeals Board finds that claimant has failed to meet his burden of proving that he gave timely notice of his alleged October 11, 1994, accident.

Claimant's reliance upon the Pyeatt decision is also misplaced with respect to the issue of whether claimant made timely written claim for the October 11, 1994, accident. A review of the record discloses that written claim for workers compensation benefits was only made within 200 days of the March 22, 1995, accident. Written claim was not made within 200 days of October 11, 1994, as required by K.S.A. 44-520a. The Appeals Board finds that claim for compensation for the March 22, 1995, injury did not, as claimant argues, also constitute written claim for purposes of the alleged October 11, 1994, injury. Wherefore, all benefits are denied for the alleged October 11, 1994, accident.

Neither party raised a question as to whether respondent filed an accident report within 28 days after the employer had notice of the accident for the purpose of determining if claimant had 200 days under K.S.A. 44-520a to serve written claim on the employer or whether that time was extended to one year under K.S.A. 44-557. *See* Childress v. Childress Painting Co., 226 Kan. 251, 597 P.2d 637 (1979). Respondent has argued throughout that claimant had 200 days. Claimant never challenged respondent's assertion in this regard. Accordingly, for purposes of this review, it was assumed that respondent filed a report of accident within 28 days after receipt of knowledge of the accident such that claimant had 200 days and not one year from the date of accident within which to serve his written claim upon respondent.

Respondent admits the compensability of claimant's March 22, 1995, accident. The only issue raised concerning claimant's claim for compensation arising from the March 22, 1995, accident concerns the nature and extent of disability. As his was an unscheduled injury, the claimant's entitlement to permanent partial disability benefits is governed by K.S.A. 44-510e(a) which provides in pertinent part:

> "The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee

> is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury."

The parties stipulated to a 7.5 percent functional impairment. The evidence shows that claimant continued to work for respondent at a comparable wage until October 26, 1995, when he was laid off due to respondent's inability to accommodate his restrictions. Accordingly, claimant would be entitled to permanent partial disability benefits based upon his percentage of functional impairment for the period following his March 22, 1995, accident date through his last day worked of October 25, 1995. Thereafter, claimant would be entitled to a work disability based upon the average of his tasks loss and his wage loss.

Claimant was unemployed from October 26, 1995, through November 24, 1995, a period of 4.29 weeks. During this period claimant had no earnings and thus had a 100 percent wage loss. Claimant became employed part time on November 25, 1995, and was paid at the rate of $5 per hour. Effective September 1, 1996, claimant became employed full time at an annual salary. During the period of November 25, 1995, through August 31, 1996, claimant was paid a total of $3,655. Dividing $3,655 by the 40.14 weeks contained within the period of November 25, 1995, through August 31, 1996, computes to average weekly earnings of $91.06 per week. Dividing this sum by claimant's stipulated average weekly wage of $458.26 equals a wage loss of 80 percent.

Beginning September 1, 1995, claimant was paid an annual salary of $10,000. This calculates out to a weekly salary of $192.32. When comparing claimant's post-injury wage of $192.32 per week to his stipulated average weekly wage results in a loss of 58 percent. Thus, the wage-loss prong of the work disability statute would be based upon 58 percent beginning September 1, 1996.

Only two physicians gave opinions concerning the loss of claimant's tasks performing ability. Anthony G. A. Pollock, M.D., was the orthopedic surgeon to whom claimant was referred by the authorized treating physician, Dr. Larry Wilkinson. Dr. Pollock recommended restrictions against constant lifting over 10 pounds, frequent lifting over 20 pounds, and occasional lifting over 50 pounds. Dr. Pollock testified that based upon his restrictions, claimant had sustained an 8 percent tasks loss.

Claimant was also seen by Dr. Ernest R. Schlachter for an independent medical examination at the request of his attorney. The history given Dr. Schlachter by claimant was of a back injury having occurred on October 11, 1994, as a result of lifting a jackhammer. Claimant gave Dr. Schlachter no history of a second back injury having occurred on March 22, 1995. Dr. Schlachter recommended permanent restrictions against constant lifting over 10 pounds, frequent lifting over 20 pounds, and occasional lifting over 50 pounds. Dr. Schlachter further testified that, based upon his restrictions, claimant sustained a 40 percent tasks loss. When asked to assume that claimant had sustained not one but two low-back injuries, with the second injury occurring on March 22, 1995,

Dr. Schlachter opined that he would apportion 50 percent of claimant's current impairment to the injury of October 11, 1994, and 50 percent to the injury of March 22, 1995. Dr. Schlachter testified that his restrictions would be the same for each of the two injuries alleged.

The Administrative Law Judge found 40 percent to be the tasks loss opinion of Dr. Schlachter and 8 percent to be the tasks loss opinion of Dr. Pollock. He then averaged these two opinions to find claimant had a 24 percent tasks loss. He then averaged the $5 per hour claimant was earning post injury with the $10 per hour he earned while working for respondent to find claimant had a 50 percent wage loss. Averaging the 24 percent tasks loss with the 50 percent wage loss, the Administrative Law Judge awarded a work disability of 37 percent.

K.S.A. 44-510e(a) requires wage loss to be determined by "the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury." Accordingly, the approach employed by the Administrative Law Judge to compare hourly rate pre-injury with hourly rate post-injury is inappropriate. The comparison must be average weekly wage to average weekly wage. Accordingly, the Appeals Board finds that claimant's wage loss prong should be calculated as described above.

With respect to claimant's loss of tasks performing ability, the 40 percent opinion given by Dr. Schlachter was rendered ineffective when Dr. Schlachter testified that claimant's restrictions would be the same following the March 22, 1995, low-back injury as they were following the October 11, 1994, low-back injury. Because claimant's restrictions were not any greater by reason of the compensable injury of March 22, 1995, there can be no work disability attributed to that second accident. As Dr. Schlachter's tasks loss opinion was based upon the same restrictions for both injuries, claimant would not have sustained any additional tasks loss as a result of the second injury. Accordingly, the tasks loss opinion given by Dr. Schlachter is not specifically for the March 22, 1995, injury. Since the March 22, 1995, injury is the only injury for which compensation is being awarded, Dr. Schlachter's tasks loss opinion cannot be utilized for the March 22, 1995, accident.

Respondent argues for a 4 percent tasks loss finding as a compromise between what was in effect a 0 percent opinion by Dr. Schlachter and the so-called 8 percent opinion of Dr. Pollock. The Appeals Board, in this instance, decides to follow that approach. However, the Appeals Board finds that Dr. Pollock's testimony that claimant lost 3 out of the 13 tasks identified constitutes a 23 percent rather than an 8 percent loss of tasks performing ability. The Appeals Board finds the testimony of Dr. Pollock and that of Dr. Schlachter should be given equal weight as to the extent of claimant's tasks loss for the March 22, 1995, injury and, accordingly, finds claimant sustained a loss of tasks performing ability of 11.5 percent.

Claimant gave Dr. Schlachter a history of his back improving slightly between October 11, 1994, and March 22, 1995. He gave Dr. Pollock a history of his back getting better. Also, the record reflects that claimant was able to continue working after the October 11, 1994, accident but was ultimately terminated following his March 22, 1995, accident because the respondent was unable to accommodate the restrictions given claimant after that second injury. Thus, claimant's work disability is directly attributable to the second accident.

Finally, with regard to functional impairment, as noted above the parties stipulated to a 7.5 percent functional impairment resulting from the combination of both the October 11, 1994, and the March 22, 1995, accidents. Both medical experts were asked to apportion claimant's functional impairment as between the two accidents. Dr. Schlachter's opinion was that claimant's ultimate functional impairment was attributable one-half to each accident. Dr. Pollock appears to attribute all of claimant's impairment to the second accident based upon his assumption that claimant had completely recovered from the first accident before the March 1995 injury. This assumption does not fit claimant's testimony of ongoing, or even worsening, symptoms. Therefore, the Appeals Board finds that one-half or 3.75 percent of the stipulated 7.5 percent functional impairment preexisted claimant's accident of March 22, 1995. K.S.A. 44-501(c) provides in pertinent part that:

> "The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting."

Accordingly, the permanent partial disability awarded claimant in this case shall be reduced by the 3.75 percent functional impairment which has been determined to be preexisting.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge John D. Clark dated December 6, 1996, should be, and is hereby, modified as follows:

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, John Faroh, and against the respondent, Sedgwick County, a qualified self-insured, for an accidental injury which occurred March 22, 1995, and based upon an average weekly wage of $458.26 for 0.14 weeks of temporary total disability compensation at the rate of $305.52 per week or $42.77; followed by 15.56 weeks of permanent partial disability compensation at the rate of $305.52 per week or $4,753.89, for a 3.75% permanent partial disability based upon impairment of function; followed by 4.29 weeks of permanent partial disability

compensation at the rate of $305.52, or $1,310.68, based upon a 52% work disability; followed by 40.14 weeks of permanent partial disability compensation at the rate of $305.52 per week or $12,263.57, based upon a 42% work disability, followed by 68.66 weeks of permanent partial disability compensation at the rate of $305.52 per week, or $20,977, for a 31% work disability, making a total award of $39,347.91.

As of March 31, 1997, there is due and owing claimant 0.14 weeks of temporary total disability compensation at the rate of $305.52 per week or $42.77, followed by 15.56 weeks of permanent partial disability compensation at the rate of $305.52 per week in the sum of $4,753.89 for a 3.75% functional disability; thereafter, commencing October 26, 1995, 74.72 weeks of permanent partial work disability compensation at the rate of $305.52 per week or $22,828.45, making a total due and owing of $27,625.11, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of $11,722.80 is to be paid for 38.37 weeks at the rate of $305.52 per week, until fully paid or further order of the Director.

All other orders of the Administrative Law Judge are adopted by the Appeals Board as its own to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of March 1997.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Gerard C. Scott, Wichita, KS
E. L. Lee Kinch, Wichita, KS
John D. Clark, Administrative Law Judge
Philip S. Harness, Director